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the said work after receiving the payment of RM700,000 from the plaintiff. The defendants denied the said oral agreement, the liability and quantum as alleged by the plaintiff.

Held, dismissing the plaintiff's claim with costs:

- (1) The plaintiff's prayer sought RM1m from each defendant did not reflect the pleadings and evidence. It may be fatal to the case as the claim against the right party and the right sum had not been identified. Even after amendment was made and agreed upon by the defendants to read as 'Against the defendants or anyone or more of them the sum of RM1,000,000 or alternatively damages', such prayer was ambiguous and could not be entertained. It is a cardinal principle of law that he who alleges must prove. It was not for the court to pick and choose what amount the defendants were liable in relation to a specific pleading. The pleadings was also not based on work done but more on terms of oral agreement inconsistent with earth filling agreement, subcontract and contemporaneous document. This by itself was fatal to the plaintiff's case (see para 8).
- (2) Further, the plaintiff had made a payment of RM700,000 for part of the work done by the second defendant and made a claim of RM1m from the first defendant for the said work done by the second defendant. This being the evidence, the prayer to seek RM1m from first or second or third defendant did not seem to be consistent with the plaintiff's evidence. In addition, to seek refund of RM700,000 as prayed was also not consistent with the plaintiff's case where there was evidence by the plaintiff that 30% of the work was completed by the second defendant even though it was not established (see para 9).
- (3) The plaintiff also pleaded fraudulent misrepresentation without giving full particulars as envisaged by O 18 r 12 of the Rules of the High Court 1980. Further, the allegation of fraudulent misrepresentation was not consistent with the earth filling agreement between the plaintiff and the first defendant and the subcontract between the plaintiff and the second defendant as under the earth filling agreement, the plaintiff had to do the work and claim progressively from the first defendant and under the subcontract with the second defendant, the plaintiff had to pay for work done (see paras 17–18).

- A (4) It was inconceivable for a public listed company to release payment without checking the work done. If such payment was released without the work being done then the person or persons responsible for releasing such payment might be liable in negligence or breach of fiduciary duty. The second defendant had specifically alleged in the evidence that some commission had been sought by the plaintiff's representative in this case which was subject matter of police complaint (see para 20).
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- C (5) On the facts, the court did not find any merit in the first defendant's counterclaim as the first defendant had not shown that it had performed its part of the bargain to rely on the terms of the earth filling agreement. The first defendant had not through its evidence proved loss or damages (see para 23).

D **[Bahasa Malaysia summary]**

- E Defendan pertama melantik plaintiff sebagai kontraktor utama mengikut satu perjanjian mengisikan tanah, untuk sejumlah RM3.4j. Plaintiff memberikan subkontrak kepada defendan kedua untuk sejumlah RM3.2j. Plaintiff akan mendapat keuntungan sejumlah RM200,000. Ini tidak terjadi walaupun plaintiff telah membayar RM700,000. Plaintiff menegaskan bahawa sebelum menandatangani perjanjian mengisikan tanah tersebut di antara plaintiff dan defendan pertama dan pengeluaran surat award oleh plaintiff kepada defendan kedua, terdapat satu perjanjian lisan di antara plaintiff, defendan pertama dan kedua di mana defendan pertama akan menggunakan plaintiff sebagai kontraktor untuk membersihkan, mengisikan dan meratakan tanah-tanah kepunyaan defendan pertama, atas syarat bahawa plaintiff akan menggunakan subkontraktor yang dilantik oleh defendan pertama iaitu defendan kedua sebagai subkontraktor plaintiff untuk menjalankan kerja tersebut untuk plaintiff. Bayaran kepada plaintiff oleh defendan pertama akan dibayar sebaik sahaja defendan kedua menerima bayaran daripada plaintiff. Kemudiannya pada 18 November 1997 defendan kedua menyampaikan bayaran interim pertama yang perlu dibayar sebanyak RM900,000 kepada plaintiff untuk sebahagian daripada kerja yang telah dilakukan dan plaintiff telah membayar defendan kedua RM700,000. Pada 20 November 1997, plaintiff menyampaikan tuntutan kemajuan No 2 kepada defendan pertama untuk nilai kerja yang telah dilakukan setakat 15 November 1997 sebanyak RM1j di mana defendan pertama enggan membayar plaintiff. Plaintiff juga menegaskan bahawa terdapat salah nyata fraud di mana defendan kedua melalui defendan ketiga telah mendorong plaintiff membayar defendan kedua jumlah RM700,000 sementara pada kesemua masa yang material defendan kedua mengetahui bahawa defendan pertama tidak akan membayar plaintiff langsung. Plaintiff juga menegaskan bahawa ia berhak kepada tuntutan ganti rugi pra jumlah tertentu sebanyak RM50,000 daripada defendan kedua
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kerana tidak menyelesaikan kerja tersebut atas alasan bahawa defendan kedua sepatutnya membuat dan menyelesaikan kerja tersebut pada 18 Januari 1998. Akan tetapi, defendan kedua telah mengabaikan kerja tersebut selepas menerima bayaran RM700,000 daripada plaintif. Defendan-defendan menafikan perjanjian lisan tersebut, liabiliti dan kuantum seperti yang didakwa plaintif.

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Diputuskan, menolak tuntutan plaintif dengan kos:

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- (1) Permohonan plaintif untuk RM1j daripada setiap defendan tidak menggambarkan pliding-pling dan bukti. Ia mungkin mudarat kepada kes kerana tuntutan terhadap pihak yang betul dan jumlah yang betul tidak dikenalpasti. Walaupun selepas pindaan dibuat dan dipersetujui oleh defendan-defendan untuk dibaca sebagai '*Against the defendants or anyone or more of them the sum of RM1,000,000 or alternatively damages*', permohonan sebegini adalah meragukan dan tidak boleh dilayan. Ia adalah satu prinsip utama undang-undang bahawa siapa yang mendakwa perlu membuktikannya. Ia bukan terpulang kepada mahkamah untuk memilih berapa amaun defendan-defendan bertanggungjawab berhubung dengan sesuatu pliding. Pliding-pling juga tidak berdasarkan kerja yang telah dilakukan tetapi lebih atas terma-terma perjanjian lisan yang tidak konsisten dengan perjanjian mengisikan tanah, subkontrak dan dokumen semasa. Ini dengan sendirinya adalah mudarat terhadap kes plaintif (lihat perenggan 8).
- (2) Selanjutnya, plaintif telah membuat bayaran sebanyak RM700,000 untuk kerja-kerja yang telah dilakukan oleh defendan kedua dan menuntut RM1j daripada defendan pertama untuk kerja yang telah dilakukan oleh defendan kedua. Memandangkan ini merupakan keterangan, permohonan untuk RM1j daripada defendan pertama atau kedua atau ketiga tidak nampak seperti konsisten dengan keterangan plaintif. Seterusnya untuk menuntut RM700,000 dikembalikan seperti yang dipohon juga tidak konsisten dengan kes plaintif di mana terdapat keterangan oleh plaintif bahawa 30% kerja telah disempurnakan oleh defendan kedua walaupun ia tidak dibuktikan (lihat perenggan 9).
- (3) Plaintif juga memplidkan salah nyata fraud tanpa memberi butir-butir seperti yang ditetapkan oleh A 18 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Selanjutnya dakwaan salah nyata fraud adalah tidak konsisten dengan perjanjian mengisikan tanah di antara plaintif dan defendan pertama dan subkontrak di antara plaintif dan defendan kedua oleh kerana di bawah perjanjian mengisikan tanah, plaintif dikehendaki melakukan kerja dan menuntut secara progresif daripada

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A defendan pertama dan di bawah subkontrak dengan defendan kedua, plaintif terpaksa bayar untuk kerja yang dilakukan (lihat perenggan 17–18).

B (4) Tidak mungkin untuk satu syarikat awam yang disenaraikan membuat bayaran tanpa memeriksa sama ada kerja telah dilakukan. Sekiranya bayaran telah dibuat tanpa kerja dilakukan maka orang atau orang-orang yang bertanggungjawab membuat bayaran tersebut akan bertanggungjawab terhadap kecuaiian atau melanggar kewajipan fidusiari. Defendan kedua telah secara khusus mendakwa di dalam keterangannya bahawa komisen telah dipohon oleh wakil plaintif dalam kes ini yang telah menjadi perkara utama aduan kepada polis (lihat perenggan 20).

C (5) Atas fakta, mahkamah tidak menemui sebarang merit di dalam tuntutan balas defendan pertama oleh kerana defendan pertama telah tidak menunjukkan bahawa ia telah melakukan bahagiannya untuk bergantung kepada terma-terma perjanjian mengisikan tanah tersebut. Defendan pertama telah tidak melalui keterangannya membuktikan kehilangan ataupun ganti rugi (lihat perenggan 23).]

E **Notes**

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5522–5557.

Cases referred to

F *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21 (refd)

Legislation referred to

Civil Law Act 1956

Evidence Act 1950 ss 91, 92

G Rules of the High Court 1980 O 18 r 12

Jammie Tai (Tang & Partners) for the plaintiff.

Paul Tang Ngoung Wee (Tan, Yap & Tang) for the first and third defendants.

Jee Baldeweh Singh (JB Singh & Co) for the second defendant.

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Hamid Sultan JC:

I [1] This is my judgment in respect of the plaintiff's claim against the defendants for breach of earth filling agreement and the counterclaim of the first defendant in respect of the same agreement.

[2] In brief, the first defendant employed the plaintiff as main contract pursuant to an earth filling agreement, for the sum of RM3.4m. The plaintiff

subcontracted it to the second defendant for the sum of RM3.2m. The plaintiff was to benefit a sum of RM200,000. This did not happen, notwithstanding the plaintiff has paid RM700,000 and hence this claim. The plaintiff's version is as follows:

- (a) it is the plaintiff's contention that prior to the execution of an earth filling agreement between the plaintiff and the first defendant and issuance of a letter of award by the plaintiff to the second defendant, there exists an oral agreement between plaintiff, first and second defendants. The oral agreement was that the first defendant (as employer) would engage plaintiff as their contractor to clear, earth fill and level (hereinafter referred to as 'the said work') Lots 565, 592 and 593 all of Block 4 Muara Tebas Land District (hereinafter referred to as 'the said lands') belonging to the first defendant, on condition that the plaintiff would engage the first defendant's nominated subcontractor ie the second defendant as the plaintiff's subcontractor to actually carry out the said work for the plaintiff. Payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff; A
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- (b) the said oral agreement was reached by Ms Anne Kung, the executive director of the plaintiff, and the third defendant, the common director of the first and second defendants; E
- (c) subsequently, on 18 November 1997 the second defendant submitted their first interim payment of RM900,000 to the plaintiff for part of the said work done and the plaintiff paid the second defendant RM700,000; F
- (d) on 20 November 1997, the plaintiff submitted their progress claim No 1 to the first defendant for a value of work done as at 15 November 1997 of RM1m. However, the first defendant refused to pay the plaintiff the sum of RM1m or any part thereof, which the plaintiff is entitled to; G
- (e) it is the plaintiff's contention that because of the first defendant's refusal to pay the plaintiff the sum of RM1m, the first defendant is in breach of the earth filling agreement and by its non-payment has repudiated the earth filling agreement; H
- (f) the plaintiff contends that the second defendant through the third defendant has induced the plaintiff to pay the second defendant a sum of RM700,000 while at all material times the second defendant knew that the first defendant would not pay the plaintiff at all. Therefore, the plaintiff is entitled to the return of RM700,000 from the second defendant for fraudulent misrepresentation; I

- A (g) also, it is the plaintiff's contention that they are entitled to claim a pre-liquidated damages of RM50,000 from the second defendant for non-completion of the said work on the ground that the second defendant should have undertaken and completed the said work on 18 January 1998. However, the second defendant had abandoned the
- B said work after receiving the payment of RM700,000 from the plaintiff.

[3] The defendants deny the said oral agreement, the liability and quantum as alleged by the plaintiff.

- C [4] The first defendant's version, inter alia, is as follows:
- (a) the first defendant entered into the earth filling agreement with the plaintiff to pay the plaintiff RM3.4m to complete the earth filling works within three months from date of handing over of possession of the site;
- D (b) possession of the site was handed to the plaintiff upon execution of the earth filling agreement;
- (c) the plaintiff wanted the second defendant to subcontract the earth filling works and awarded the earth filling works to the second
- E defendant pursuant to the letter of award;
- (d) there was no oral back to back agreement with the plaintiff in terms of payment of the contract price in the manner pleaded by the plaintiff;
- (e) the second defendant claims RM900,000 but the plaintiff only paid
- F RM700,000;
- (f) there was no representation or inducement as pleaded;
- (g) it was the plaintiff who breached the agreement for failing to complete the work and therefore has repudiated and/or abandoned the earth
- G filling agreement and this was in part due:
- (i) to the unhappiness generated over the disagreement the payment of commission/payment of RM2,000 and RM60,000 to PW1 through PW3;
- H (ii) to the unhappiness generated over the refusal of the second defendant to claim for further claim of RM2.49m;
- (h) any loss suffered by the plaintiff was caused solely by the plaintiff's own wrong doing or fault;
- I (i) the plaintiff did not suffer the damages of RM1m as pleaded;
- (j) the first defendant's counterclaim against the plaintiff for loss and damages by reason of the plaintiff's breach and repudiation of the earth filling agreement;

- [5] The second defendant's version, inter alia, is as follows: A
- (a) that there is an earth filling agreement executed between the plaintiff and the first defendant and a letter of award by the plaintiff in favour of the second defendant for earth filling works; B
 - (b) it was PW1 who initiated the plaintiff's offer to perform the earth filling works and DW1 was the one who conducted the negotiations with PW1; C
 - (c) there was no oral agreement or back to back agreement as pleaded; D
 - (d) there was a submission by the second defendant for a claim of RM900,000 but the plaintiff only paid the second defendant RM700,000; E
 - (e) there was no representation or inducement as pleaded by the plaintiff; F
 - (f) the claim of RM1m against the second defendant is without basis and unreasonable; G
 - (g) that the payment of RM2,000 and RM60,000 were paid to PW1; H
 - (h) that time is not the essence of the letter of award, the said works was stopped at the instruction and advice of PW1 and with the consent agreement with the plaintiff and/or that the plaintiff is estopped from claiming that the second defendant did not complete the works because of such instruction, advice and consent; I
 - (i) that the said works was stopped and the plaintiff acquiesced to the stoppage; G
 - (j) it is the plaintiff who have repudiated the agreement by failing to pay the second defendant the full claim of RM900,000. G
- [6] The third defendant's version, inter alia, is as follows:
- (a) there was an earth filling agreement; H
 - (b) that the plaintiff through PW1 wanted the second defendant to be subcontractor to the earth filling works and the letter of award was given by the plaintiff and accepted by the second defendant; I
 - (c) it is a term of the contract between the plaintiff and the second defendant under the said letter of award that the contract sum of RM3,200,000 shall be progressively paid by the plaintiff to the second defendant upon confirmation of each stage of the work done by the second defendant; I
 - (d) there is no oral agreement or back to back agreement as pleaded;

- A** (e) there was a claim by the second defendant for RM900,000 but the plaintiff breached and repudiated the letter of award by paying the second defendant RM700,000;
- (f) there was no representation or inducement as pleaded;
- B** (g) deny that the plaintiff suffered losses and damages;
- (h) the losses and damages suffered by the plaintiff, if any was due solely to the plaintiff own wrong doing or fault.
- C** [7] For the purpose of the judgment, it is necessary to set out the statement of claim in extenso, which, inter alia, reads as follows:
- (a) the third defendant is a director of both the first and second defendant companies;
- D** (b) it was orally agreed by the plaintiff and the first and second defendants that the first defendant (as employer) would engage the plaintiff as contractor to clear, earth fill, and level Lots 50 5, 592, and 593 all of Block 4 Muara Tebas Land District belonging to the first defendant, on condition that the plaintiff would engage the second defendant as its subcontractor to actually carry out the works. Payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff. The said oral agreement was reached by Ms Anne Kung, the executive director of the plaintiff, and the third defendant, the common director of the first and second defendants;
- E**
- F**
- (c) pursuant to the said oral agreement:
- (i) the plaintiff and the first defendant executed an earth filling agreement dated 15 October 1997, ('the earth filling agreement') whereby in consideration of the plaintiff carrying out the above described works, the first defendant was to pay to the plaintiff the sum of RM3,400,000 in stages as the works progressed; and
- G**
- (ii) the plaintiff engaged the second defendant as its subcontractor to carry out the works at a total consideration of RM3,200,000 to be paid in stages as the works progressed vide letter of award dated 18 October 1997 ('the subcontract agreement');
- H**
- (d) upon completion of part of the works, the plaintiff submitted a claim for RM1,000,000 inclusive of the 50/16 retention monies to the first defendant being value of the works done as at 15 November 1997;
- I**
- (e) the second defendant submitted a claim under the subcontract agreement for works done amounting to RM900,000 on 18 November 1997;

- (f) the defendants, acting in concert, then fraudulently induced the plaintiff to make payment to the second defendant under the subcontract agreement upon the representation that the first defendant would then immediately pay the plaintiff under the earth filling agreement. The said representation was made by the third defendant to the plaintiff's executive director, Ms Anne Kung on or about 27 November 1997; A
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- (g) the plaintiff, acting upon the faith and truth of the said representation, and induced thereby, paid to the second defendant the sum of RM700,000; C
- (h) the first defendant then failed and or refused to pay the amount due to the plaintiff and has by its non-payment repudiated the earth filling agreement. Despite a letter of demand from the plaintiff's advocates dated 3 January 2000, the first defendant still fails and or refuses to pay the amount due or any part thereof; D
- (i) the defendants' representation as outlined in para 7 above was fraudulent and false in that they knew and intended that the first defendant would not pay the plaintiff. Particulars of falsity — The defendant knew and intended that the first defendant would not make any immediate payment or any payment at all to the plaintiff as represented; E
- (j) the plaintiff suffered loss and damage as a result, as it has paid to the second defendant the sum of RM700,000 pursuant to the sub-contract agreement yet has failed to gain the sum of RM1,000,000 due under the earth filing agreement; F
- (k) further, it was a term of the subcontract agreement that the second defendant would pay to the plaintiff the sum of RM50,000 per month as agreed pre-estimated liquidated damages in the event that the second defendant failed to complete the said works within 3 months from the date of commencement; G
- (l) the date of commencement of the said works was 18 October 1997; H
- (m) the second defendant failed to complete the said works by 18 January 1998 and to date has failed to complete the same;
- (n) the second defendant is therefore liable to pay to the plaintiff the sum of RM50,000 per month calculated from 18 January 1997 to the date of completion of the said works; I
- (o) against the defendants each of them the sum of RM1,000,000; or alternatively, damages;
- (p) against the second defendant, return of the said sum of RM700,000;

- A (q) against the second defendant pre-estimated liquidated damages of RM50,000 per month calculated from 18 January 1998 and still continuing;
- B (r) interest on the amount found to be due to the plaintiff at the rate of 8% per annum from the date of this writ to the date of full and final payment pursuant to s 11 of the Civil Law Act 1956;
- (s) such further and or other relief as this court may think fit; and
- (t) costs.

C

PLEADINGS

- D [8] Before I deal with the evidence it has become necessary for me to deal with the pleadings. At the end of the plaintiff's case, I had brought to the attention of the parties that the plaintiff's prayer seeking RM1m from each defendant does not reflect the pleadings and evidence. I have observed that it may be fatal to the case as the claim against the right party and the right sum has not been identified. The plaintiff's counsel requested that prayer (1)
- E be amended to be read as 'Against the Defendants or anyone or more of them the sum of RM1,000,000 or alternatively damages'. The defendants did not object to the amendment. The amendment was allowed. In my view, such prayer is ambiguous and cannot be entertained. For it is a cardinal principle of law that he who alleges must prove. It is not for the court to pick and
- F choose what amount the defendants are liable in relation to a specific pleading. I also observed that the pleadings is not based on work done but more on terms of oral agreement inconsistent with the underlying agreements ie earth filling agreement, subcontract and contemporaneous document. This by itself is fatal to the plaintiff's case.

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- H [9] Further, in this case the plaintiff has made a payment of RM700,000 for part of the work done by the second defendant and made a claim of RM1m from the first defendant for the said work done by the second defendant. This being the evidence, the prayer to seek RM1m from first or second or third defendant does not seem to be consistent with the plaintiff's evidence. In addition, to seek refund of RM700,000 as prayed is also not consistent with the plaintiff's case where there was evidence by the plaintiff that 30% of the work was completed by the second defendant even though it was not established. Further, the prayer for pre-estimated liquidated
- I damages of RM50,000 is not consistent with the allegation of refund of RM700,000 on the basis of fraudulent misrepresentation. On one hand, the plaintiff cannot demand refund of the money paid because there was fraudulent misrepresentation. On the other hand, say, the plaintiff is entitled to pre-estimated liquidated damages. In my view, the plaintiff's action as

pleaded cannot be sustained in law. However, before making a decision, it is prudent for me to go through the evidence and finally decide the outcome of this case.

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EVIDENCE

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[10] Five persons came to give evidence on the plaintiff's behalf and one person each for the first and second defendants and the third defendant also gave evidence. I have gone through the witness statements in detail. I find that the plaintiff's evidence goes beyond what was pleaded. In consequence, it is sufficient for me to deal with the material part of the evidence.

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[11] In this case, the main witness for the plaintiff was Anne Kung Soo Ching, the CEO at the material time and a person having a legal background. Her evidence was to fortify the oral evidence pleaded in the statement of claim. The law on oral evidence to contradict written document is rarely entertained. The reasons are as follows:

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(i) Sections 91 and 92 of the Evidence Act 1950 ('EA 1950') set out the principle that the documents are the sole evidence of the transaction unless the recognised exception applies.

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(ii) The rule of exclusion of oral evidence by documentary evidence appears to be based on the following reasons; (a) in the case of oral testimony, its credibility depends on the manner and veracity of the witness and on the fallibility of human memory; whereas these imperfections do not exist in the case of documentary evidence; (b) by producing the document in proof of its contents, the court is able to know the nature of the whole transaction entered into by the parties; (c) in the case of written documents it must be the intention of the parties that the document should be the sole proof. Thus, to give effect to the intention it is only appropriate that the document must be produced; (d) in the case of documents which are required by law to be reduced into writing, it would tantamount to defeating the provision of the law, if facts could be proved by oral evidence.

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(iii) Once a document is proved under s 91, no oral evidence is permissible to contradict, vary, add or subtract from the terms of the document. However, there are six exceptions to this rule which are stated in the section. Oral evidence is admissible in the following cases: (a) any fact which would invalidate a document or which would entitle any person to an order in respect of it, may be proved, if it can be shown that it was obtained by fraud, or was without consideration or was executed by him during minority or under a mistake of laws or facts; (b) a separate oral agreement as to a matter, on which the document is silent, and which is not inconsistent with its terms may be proved; (c) a separate oral

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- A agreement constituting a condition precedent to the attaching of any obligation under the documents may be proved; (d) a distinct subsequent oral agreement to modify rescind, the original contract or grant or disposition of property may be proved except when such is required by law to be in writing; (e) any usage or custom by which
- B incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not inconsistent with its express terms; (f) any fact which shows in what manner that language of the document is related to existing fact may be proved.
- C (iv) In *Lee Wah Bank Ltd v Ng Kim Lek & Ors* [1979] 1 MLJ 21, the Federal Court observed:
- D Section 92, of course, applies where upon the face of it, the written instrument appears to contain the whole of the terms of the contract. But where it appears that it does not contain the whole agreement between the parties and that there are certain other oral conditions which are not inconsistent with the written instrument and which would make up the whole contract, oral evidence is admissible to prove those other conditions.
- E [12] In this case attempting to adduce oral evidence to contradict, the earth filling agreement, and the subcontract impinge on ss 91 and 92 of the EA 1950.
- F [13] Further, in this case the plaintiff is a public listed company and claiming that there is an oral agreement. Such oral agreement is said to have been negotiated by the CEO with the directors of the defendants. The existence of the oral agreement has not been put in writing in any contemporaneous documents between the parties to show that it has been an agreed term.
- G [14] The allegation of the oral agreement and the several statements in the pleading is also contradictory. The pleading at para 4 says that:
- H ... Payment to the plaintiff by the first defendant will be made back to back immediately upon the second defendant receiving its payment from the plaintiff.
- I [15] This is not a back to back agreement. Directly in contradiction with the pleadings, the witness PW1 in her witness statements says:
- 16 Following from the proposal made by Ah Hock and the third defendant, it was orally agreed ('the said oral agreement') between the plaintiff and the first and second defendants represented by their common director, the third defendant that the first defendant would engage the plaintiff as its contractor in the said work, ON CONDITION that the plaintiff would engage the second defendant as its subcontractor to actually carry out the said work. Payment by the plaintiff to the

second defendant will be made back to back immediately upon the plaintiff receiving its payment from the first defendant. The said oral agreement was reached between myself being the Executive Director of the plaintiff at that time and the third defendant who represented to me that he has the authority to act for both first and second defendants.

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[16] If the version of PW1 is correct, there could have been no payment made to the second defendant at all without first receiving money from the plaintiff.

FRAUDULENT MISREPRESENTATION

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[17] In this case, the plaintiff pleads fraudulent misrepresentation without giving full particulars as envisaged by O 18 r 12 of the Rules of the High Court 1980.

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[18] Further, the allegation of fraudulent misrepresentation is not consistent with the earth filling agreement between the plaintiff and the first defendant and the subcontract between the plaintiff and the second defendant. My reasons are as follows:

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- (i) under the earth filling agreement, the plaintiff has to do the work and claim progressively from the first defendant;
- (ii) under the subcontract with the second defendant, the plaintiff had to pay for work done;
- (iii) it was the evidence of the plaintiff that 30% of the work was completed and payment was made. This is reflected in the agreed documents as well as in PW1's witness statement as follows:

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24. On 18 November 1997, the second defendant submitted their first payment claim under the said award letter for works done amounting to RM900,000. Upon inquiry as to the actual work done, Ah Hock who is the manager of the first defendant informed me verbally that approximately, 30% of the works were completed. I refer to p 5 of agreed bundle which is the second defendant's first payment claim.

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[19] Though this is not conceded by the first defendant and there is no actual proof to say the amount of work done. Further, there was no claim against the first defendant for work done partly supported by proof of scope of work done.

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[20] It is inconceivable for a public listed company to release payment without checking the work done. If such payment is released without the work being done then the person or persons responsible for realising such

A payment may be liable in negligence or breach of fiduciary duty etc, which I need not elaborate here. The second defendant in this case has specifically alleged in the evidence that some commission has been sought by the plaintiff's representative in this case which is subject matter of police complaint which is also not necessary for me to elaborate here. However,

B from the evidence, it is clear that there has been much animosity between the plaintiff and the first defendant in consequence of various commercial transactions which has been subject matter of civil suits and reflected in the witness statement.

C [21] It is my judgment that the allegation of oral agreement by the plaintiff cannot be sustained. The plaintiff's claim against the defendants must be dismissed for reasons stated above.

THE FIRST DEFENDANT'S COUNTERCLAIM

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[22] The first defendant's counterclaim reads as follows:

- (a) by reason of the plaintiff's said breach and/or repudiation of the earth filling agreement, the first defendant has suffered loss and damage;
- E (b) the first defendant claims against the plaintiff:
- (i) damages;
- (ii) agreed pre-estimated liquidated damages for the sum of RM50,000
- F per month calculated from 15 January 1998 and still continuing;
- (iii) interest under Civil Law Act 1956;
- (iv) interest at the rate of 8% per annum chargeable on any amount that
- G may be awarded by the court from the date of judgment until full payment;
- (v) costs; and
- (vi) any other relief this court deems fit and just.

H [23] I do not find any merit in the first defendant's counterclaim for the following reasons:

- (i) The first defendant has not shown that he has performed his part of the bargain to rely on the terms of the earth filling agreement.
- I (ii) If the plaintiff's claim was not entertained, it was for the reasons stated in the judgment and not otherwise.
- (iii) The first defendant has not through its evidence proved loss or damages.

[24] Further, in this case, the first defendant has filed an application to amend its defence and counterclaim (encl 135) during the course of the trial. I have informed the parties that I will consider whether or not to allow the counterclaim before the end of the trial. Both parties have submitted. I have read the submissions. I am inclined to accept the submission of the plaintiff that it is not proper to allow the amendment at this stage of the trial. In consequence, the application for amendment, encl 135 is dismissed with no order as to costs.

[25] For reasons stated above, I make the following orders:

- (i) The plaintiff's claim against the defendants is dismissed with costs to the defendants.
- (ii) The getting up fees for the first and third defendants together shall not exceed RM50,000. The getting up fees for the second defendant shall not exceed RM50,000. If costs cannot be agreed, the defendants are at liberty to tax their costs. I hereby order so.

Plaintiff's claim dismissed with costs.

Reported by Sally Kee

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